Immediate Responses of the ACL to the forthcoming Consultation into extending a Fixed Recoverable Costs regime across the Civil Justice System.

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1 Chapter 1 – Our Background

The Association of Costs Lawyers (ACL) is a membership organisation representing students, Lawyers & retired practitioners in the field of Legal Costs.

ACL was founded in 1977, as the Association of Law Costs Draftsmen (ALCD) with the aim of promoting the status and interests of its members.

In 2007, Fellows of the ALCD were granted rights to conduct costs litigation and rights of audience under the Legal Services Act.

In 2011 the ALCD was re-named as the Association of Costs Lawyers and, in compliance with the requirements of the Legal Services Act; ACL delegated regulatory work to the Costs Lawyer Standards Board (CLSB).

There are currently 892 members of the ACL who represent both paying & receiving parties. Many act for Litigants in Person, some on a Pro-bono basis and we, as an association have recently been working closely with the Bar Pro-Bono Unit (BPBU) and Litigants-In-Person Support Strategy (LIPSS) to help deliver better access to justice in costs related matters.

All of our members have experience in costs issues and the vast majority deal with costs on a day-to-day basis, as well as using the Courts either in person or on paper regularly.

Our members recognise the need for reform and, therefore, invited the membership to put themselves forward to form a working party with a view to responding to the proposed consultation. The resultant working party comprised 6 qualified Costs Lawyers from a cross section of the profession. This document is the result of their work and has been approved by the ACL Council. It is neither meant to represent their personal opinions or those of the ACL Council but is intended to reflect the anticipated views of the membership who, with their wide ranging experience in all matters relating to costs and the Courts, will be able to add substantial context to the consultation.

2 Chapter 2 – Our Concerns Regarding Extending the Fixed Recoverable Costs Regime

As an Association we are concerned by the proposed timing of undertaking a procedural overhaul.

Given the proposals to radically change the justice system for lower value cases, we consider that it is too early to also radically change the Fixed Recoverable Costs Regime. The proposal and processes for 'whiplash' and small claims track claims need to be in place before it is possible to consider how further changes to the regime would operate effectively.

Further, there is a strong argument to suggest that an extension of the Fixed Recoverable Costs Regime at this time would be undertaken before the impact of the existing regime – which is barely 3 years old – has been assessed.

Active case and costs management is proving successful in prospectively restricting many of the excesses of litigation that lead to high legal costs and the post-LASPO test of proportionality, with its increased stringency, is retrospectively penalising parties who present unreasonable costs claims.

From a wider, systemic perspective, in the post-Brexit vote landscape we consider England and Wales need to appear an attractive jurisdiction for businesses to resolve their disputes. Companies from all over the world choose to litigate in England and Wales because of the maturity, consistency and transparency of the system. The proposals to undertake a 'far reaching' overhaul of the system of all litigation could cause conducting such litigation to

become uneconomic for those companies' legal representatives in this jurisdiction, thus pushing them to other more competitive jurisdictions. At this economically uncertain time, this is a grave risk.

The government is looking to trigger Article 50, but has already been faced by two constitutional challenges (one in relation to the triggering of Article 50 and the other in relation to 'free trade') with more, it is understood, to follow and therefore, at a time when EU laws will need to be unraveled, there is considerable peril in pushing ahead with these reforms when the shape of the post-Brexit legal system is yet to be crystallised.

Our members accept that extensions to the Fixed Recoverable Costs Regime may follow over time, however, it is vital that consultation with all stakeholders who use the Court system is undertaken to ensure that any extension will be consistent with the key tenet of all recent reforms - namely access to justice - and will provide fair and proportionate remuneration for the work done to promote such access. If a FRC regime is introduced at the wrong level and without fair remuneration, there must be a real concern that litigants will not be able to access the correct level of legal expertise without bearing much of the cost themselves, thus potentially creating an inequality of arms. It is a point which will be made by many, but Access to Justice is one of the cornerstones of the legal system of England and Wales.

Finally, it is our view that the various levels of fixed recoverable costs are not something which can be produced by an academic exercise without reference to the legal profession as a whole, to ensure that any extension is applied to the correct categories of cases and that the quantum of the fees is appropriate - a data collation exercise is essential from across the legal professions.

3 Chapter 3 – Our Views

There is an existing scheme of fixed recoverable costs in relation to fast track claims (sub £25,000 damages) arising from road traffic accidents and employers/occupiers liability claims. The portal has also been extended to disease claims, albeit with specific exclusions and no current existence of fixed costs following a portal exit by a claim.

The reforms and review will be focusing on extending fixed recoverable costs into other areas of litigation and a consultation may show that this can provide certainty to litigants.

That is not to say, however, that there is not concern as to the far-reaching implications of a blanket introduction of fixed recoverable costs for all cases up to a financial limit. There are of course claims that proceed where the financial benefit is not the key aspect of the claim and therefore certain areas of litigation will need to be considered in isolation.

By way of example, in the *Review of Civil Litigation Costs: Preliminary Report, Sir Rupert Jackson,* at Vol 1, p.339, Chap 37, para 2.4 it was stated:

"Most defamation claims are limited to claims for general damages; special damages claims are rare. The award of damages is to compensate the successful claimant for the loss of reputation suffered, hurt feelings and to vindicate him or her. However, despite the compensatory element of damages, it is obvious that in defamation (and privacy), unlike commercial claims, the action is not just about money. A claimant may attach great value to winning his claim if the judgment vindicates him or her, even though in monetary terms the award is not substantial. This is a factor which makes applying the notion of proportionality of what is at stake, to the costs incurred more complex in (most) publication proceedings than in purely commercial disputes."

In our opinion, broad categories of litigation can be identified as: -

- RTA
- Accidents at work
- Employers Liability
- Disease claims
- Social Care (historic abuse) claims
- Single Claimant 'Holiday claims' (illness abroad)
- Clinical Negligence
- Actions against the Police
- Defamation
- Housing disrepair
- Insolvency
- Judicial Review
- Dispute Resolution

It is the ACL's view, although these are the categories which may be considered, some areas of litigation are more suited to a Fixed Recoverable Costs Regime than others. This is commented on below.

As the current model of Fixed Recoverable Costs in this country is predicated on the fast track limit of £25,000 damages it is recommended by the ACL that, should an extension of the FRC be considered appropriate at this time, the consultation focus on extending FRC at this current limit across other areas of litigation. The timing of any changes, even at the fast track limit, is still a concern as outlined at point 2 above.

Should the Government wish to extend the scheme further at a later date, the models will be in place across all facets of litigation to which the scheme can reasonably be applied.

Whilst parties may argue that there is little difference between a £25,000 RTA and a £50,000 RTA, the same can only be shown by analysis of data and the same statement is unlikely to be applicable to some areas.

The ACL therefore supports the consultation and assessment of data in relation to the application of the fixed recoverable costs regime possibly being extended to other areas of litigation with a current financial limit of £25,000 being applied. The following further reservations are raised:

- At present under the portals, there is a differential between fixed recoverable costs where liability is admitted at an early stage and those cases which proceed on the basis of no admissions or a denial having been made. This should form part of any suggestion to extend the FRC regime in the future.

- The ACL's view is that fixing costs in clinical negligence cases is problematic and any introduction of FRC should be viewed with caution. Most Clinical Negligence cases have differing facts and circumstances and breach of duty and causation is often disputed. It is accordingly difficult to predict average costs in any given basket of cases where breach of duty, causation and quantum issues may be in issue between the parties.

- Fixing Costs in actions against the Police will potentially also be problematic. Similar points about denials of liability and also expensive trials, sometimes with a Jury make predicting costs to be difficult. It is also the case that there was a recommendation by the CJC to extend QOCS in actions against the Police and until

that is in place , a FRC regime will be difficult to implement and may create a further access to justice concern.

- In the ACLs view, fixed recoverable costs are not appropriate for defamation claims not least for the reasons highlighted above.
- In the ACLs view, fixed recoverable costs are not appropriate for Judicial Review cases where the issues are very varied and where the necessary work varies dramatically between cases.
- In the ACL's view, any case or cases which may form part of a Class/Group Action are not appropriate for a FRC regime.

The ACL are more than willing to draw upon the considerable expertise our members have in order to assist and support the consultation by seeking to gather appropriate data once the data set required is known. In our opinion this exercise could prove to be of vital importance to ascertain patterns of expenditure in the above categories of litigation, before any consideration can be given to fixing the quantum of fees.

It is envisaged that this exercise could also assist in identifying patterns which can be utilised in the assessment of fixed fee amounts as well as identifying any further categories of litigation that are not appropriate for the fixed recoverable scheme as they do not follow a standard pattern of expenditure/process.

It is also envisaged that the collation of such data could assist in identifying appropriate exclusions for any proposed scheme, whether it be denials of liability in clinical negligence cases or whether there are additional amounts payable in certain circumstances.

Any exclusions/additional amounts in relation to the fixed recoverable costs regime must be clear and unambiguous in order to ensure that the Courts are not bombarded with satellite litigation.

Streamlining the Court process and the costs to be recovered in these processes is essential to ensure the smooth running of the legal system and the current consultation goes hand in hand with the reforms being put in place by the on line court. The analysis of data at this early stage and the level of data that the ACL members have at their disposal will likely make our membership an invaluable source to support the consultation and subsequent implementation of reforms, to ensure a smooth transition with minimal disruption to the system as a whole.

4 Chapter 4 – <u>Executive Summary</u>

Time is the "golden thread" recurring through the concerns expressed above.

Is this the right time?

As an Association, we do not believe this is the optimal time given the fact that there are so many other changes afoot which will, without doubt, impact on consumers and the legal profession at some level.

When will be the right time?

We believe that time to be:-

When the exit strategy from the EU is known and an appropriate impact assessment has been undertaken to determine what the effect will be on the economy, the legal profession and consumers.

When the reforms into the Court Service have been implemented, their efficiency assessed (and a reasonable period must be allowed for this), and any difficulties which presented have been overcome.

When a full and detailed consultation of members of the legal profession and consumers has been undertaken, and it is clearly shown that a Fixed Costs Regime is desirable, workable and equitable to both lawyers and consumers – i.e. that consumers are getting "quality" and are their lawyers fairly remunerated?

Timeframe for collation of data

We have indicated above that the Association is happy to investigate the harnessing of the data held by our members in an attempt to assist the consultation. In theory this is not an issue. However, any timeline set for such a process to support this consultation must be realistic to allow sufficient time for helpful, accurate and comprehensive data to be collated and analysed

We would strongly recommend that, should such an exercise be considered to be of use, a reasonable timeframe be adopted to ensure that what could prove to be a vital element to this exercise is undertaken properly.

In addition the ACL Council's Policy Officer has direct communication with her counterparts in the Law Society and other organisations and it has already been suggested that there be a pooling of data between these bodies. If that proves to be the case, and fruitful, we believe that in a realistic timeframe the data that could be gathered could prove to be invaluable to the Consultation.

Conclusion

We would merely add the hope that our comments have been useful, and extend the offer of on-going assistance to the Lord Justice Jackson and his Assessors, other members of the Senior Judiciary and the Rules Committee as it is clear that a new streamlined process is going to be required for any new or extended fixed costs regime to ensure work properly.

We believe our Association is in the enviable position of being able to access data from both Paying and Receiving Parties, which will identify the actual costs of running cases, those cases unsuited to the application of fixed costs due to complexity and those cases to which fixed costs may be applicable at first instance but that later are not.

We have already commenced work on a process for collation and analysis of such data and hope to be in a position to make a meaningful contribution.